United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: October 1, 1998

TO : Victoria E. Aguayo, Regional Director
Region 21

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Garden State Newspapers, Inc.
d/b/a Long Beach Press Telegram
Case 21-CA-32672

This case was submitted for advice as to whether: (1) the Employer's decision to dissolve its transportation department and lay off the unit employees was a mandatory subject of bargaining, and, if so, (2) the Employer failed to bargain in good faith to impasse over that decision.[1]

FACTS

The Press-Telegram publishes a daily newspaper in its facility located in Long Beach, California. On or about December 17, 1997, the Press-Telegram was purchased by Garden State Newspapers (the Employer). The Employer agreed to recognize the Union, which for many years had represented the approximately 200 editorial, circulation, and janitorial employees at the newspaper, including approximately 20 transportation drivers. The drivers, all of whom were hired by the Employer as part of its initial employee complement, were responsible for transporting the newspapers printed at the Long Beach facility to various distribution centers for delivery and/or sale to the public.

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[1] The Region also has sought advice as to whether the Employer bargained in good faith over the effects of the decision to lay off the employees, e.g., the terms of severance. We agree with the Region, for the reasons stated in its submission, that the Employer failed to bargain in good faith about the effects of the layoff decision because it failed to give timely notice of the decision to the Union.

In January and February 1998,[2] at the time of the take-over, the Employer made unilateral changes in employment conditions, including contracting out the janitorial work and transferring customer service employees to another facility.[3] In February, the Union heard rumors of a possible transfer of the printing operation in Long Beach (not represented by this Union) to a newer printing facility in Valencia, California, which the Employer had acquired by purchasing another newspaper. The city of Valencia is located approximately 65 miles north of Long Beach.

On February 27, the Union made a written request for information regarding possible printing consolidation plans which might affect the transportation workers, and demanded to bargain over any changes that might affect the unit.

On March 24, the Employer sent a memo to all its employees, including the bargaining unit employees at issue herein, announcing that it was going to move the printing operation of the Press-Telegram to Valencia. The memo stated that the Employer had not yet decided how the newspapers would be transported from Valencia to Long Beach for distribution - whether with trucks stationed in Long Beach or in Valencia. The Employer sent a similar letter to the Union, and offered to bargain over the effects of an elimination of the Long Beach transportation department if the Employer subsequently decided to handle the transportation function out of Valencia.

On April 7, the Employer sent the Union a letter stating that the transfer of the printing operation would take place on April 20, and that a decision regarding the fate of the Long Beach transportation workers would be made within the next two weeks. The Employer suggested a meeting date of April 9 to discuss possible effects if the Employer decided to displace the unit employees.

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[2] All dates hereafter are in 1998 unless otherwise specified.

[3] Those changes are the subject of another charge which has separately been submitted for advice, and which will be addressed in another memorandum.

On April 9, before the parties' scheduled meeting, the Employer gave a memo to each of the transportation department employees stating that a decision had been made, concurrent with the closure of the printing operation at Long Beach, that responsibility for transport of the paper from Valencia to Long Beach would be assumed by Valencia employees, and that the Long Beach department would be dissolved effective April 19. The memo invited Long Beach transportation department employees to apply for jobs in Valencia. Around the same time, the Employer faxed a letter to the Union stating that the transportation department would be dissolved effective April 19 and agreeing to bargain with the Union that afternoon over the effects of that decision.

When the parties met later that afternoon, the Employer told the Union that it had decided that contract drivers would be delivering the papers from Valencia, not Valencia employees. The Union proposed having the newspapers distributed from Long Beach, and this was immediately rejected by the Employer. The Union then requested information regarding the contractor that would be transporting the papers and its proposed method of operation. On April 10, the Union asked in writing for all contracts and any contractor bids regarding that work. On April 13, the Employer provided a copy of the subcontract it had executed on April 10 with Select Personnel Services, which would provide drivers who would use the Employer's trucks to make deliveries from Valencia to Long Beach. The Employer stated that this arrangement was much more "cost effective" than using Long Beach drivers, starting at $7 per hour, who would have to commute a long distance to Valencia.

The parties met again on April 14, and discussed delivery schedules, the number of required runs, special licensing of drivers, and whether the Employer would use Press-Telegram or Daily News trucks. During this meeting, the Union tendered a written proposal to have the Long Beach transportation department relocated to Valencia, where the Union would continue to represent the unit employees. Under the proposal, jobs in the relocated department would be offered first to unit employees, and then to outside drivers, and employees would be paid the contractual rate plus a travel stipend for the additional

mileage. The Employer responded that the proposal did not address the Employer's cost concerns, especially with regard to the wages and travel stipend. The Employer then gave the Union a copy of the severance package it had recently negotiated with another union which represented the pressmen, and suggested that the same package be offered to the transportation employees.

On April 17, the parties met again, and the Union presented the Employer with a letter stating its position that the relocated work was covered by the collective bargaining agreement, and that the Employer could not remove work or contract out work from the unit since it was a permissive subject of bargaining. The Union sought the legal basis for the Employer's position that it had a right to contract out the work. The Union also requested:

> complete information on the total cost of operating the current transportation department compared with the total cost of the scenario the Company is proposing. The Guild requests a full breakdown that compares all labor, operations and other costs - including but not limited to fuel, fleet maintenance, leasing expenses - associated with transporting the Press-Telegram under the current system versus under the Company's proposed system.

The Employer responded that it had the right to run its business as it saw fit, and that cost was not the motivating factor behind its decision but rather "ease of hiring and management." The Employer stated that the parties were at impasse, and that it would subcontract out the transportation work and implement the severance package it had proffered at the prior meeting for unit employees. The Union protested that the parties could not possibly be at impasse since there were outstanding information requests.

On April 18, the Employer laid off all of the Long Beach transportation employees.

ACTION

We conclude that the Employer's decision to subcontract the Long Beach transportation work and lay off the employees was a mandatory subject of bargaining, and

that the Employer failed to bargain in good faith to impasse over that decision.

The subcontracting/layoff decision should be analyzed under Dubuque Packing.[4] In First National Maintenance, the Supreme Court held that an employer's decision to close down part of its business was not a mandatory subject of bargaining, because it was a decision "akin to the decision whether to be in business at all" and, in that situation, the "harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision. . ." 452 U.S. at 677, 686. The court left Fiberboard intact, and stated that each case involving economic decisions that impact employees, "such as plant relocations, sales, other kinds of subcontracting, automation, etc." must be considered on its particular facts to determine whether "the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business." 452 U.S. at 679, 686, n. 22.

More recently, in Dubuque Packing, the Board enunciated the following test for determining whether a work relocation decision is a mandatory subject of bargaining: The General Counsel has the initial burden of showing that the decision was "unaccompanied by a basic

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[4] 303 NLRB 386 (1991). As the Employer itself acknowledged on several occasions, this decision was separate from the Employer's decision to transfer the Long Beach printing operation to a high-technology facility. It was not "inextricably intertwined" with the printing relocation decision because it was not an inevitable consequence of that decision. See Litton Financial Printing, 286 NLRB 817, 819-820 (1987) (layoffs were not an inevitable consequence of employer's conversion of plant to automation; workers could have been retrained or transferred to other positions). The Employer originally encouraged the drivers to apply to work in Valencia, and discussed with the Union the possibility of having the drivers pick up the papers in Valencia and transport them to the Long Beach distribution points.

change in the nature of the employer's operation." The Employer then has the burden of rebutting the General Counsel's prima facie case or proving certain affirmative defenses. Where the Board concludes that the employer's decision concerned the "scope and direction of the enterprise," there will be no duty to bargain over the decision.[5] The Employer also may offer affirmative defenses that (1) labor costs were not a factor in the decision or (2) even if labor costs were a factor, the union could not have offered labor cost concessions that could have changed the employer's decision.[6]

Although Dubuque Packing specifically concerned work relocation decisions, we have applied its principles to other "Category III" decisions -- decisions that have a direct impact on employment but have as their focus the economic profitability of the employing enterprise[7] -- that fall within the spectrum between Fibreboard and First National Maintenance.[8]

Here, the Employer has not engaged in subcontracting within the precise parameters of Fibreboard because it has not merely replaced existing employees with employees of a subcontractor who will do the same work at the same location and under the same employment conditions. On the other hand, although the Employer has closed its Long Beach transportation department, it has not gone out of even a portion of its business, but rather has merely

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[5] See Noblit Brothers, Inc., 305 NLRB 329, 330 (1992); Holly Farms Corp., 311 NLRB 273, 277-278 (1993), enfd. on other issues 48 F.3d 1360, 148 LRRM 2705 (4th Cir. 1995), affd. ___U.S. ___, 152 LRRM 2001 (1996).

[6] Dubuque, 303 NLRB at 391; GC Guideline at pp. 4-6.

[7] See First National Maintenance, 452 U.S. at 677.

[8] See, e.g., Rotorex Co. Inc., Case 5-CA-27338, Advice Memorandum dated April 9, 1998 (decision to close remainder of machine shop and outsource machine work); The Topps Co., Inc., Case 4-CA-25444, Advice Memorandum dated April 28, 1997 (decision to close a plant and subcontract the plant's production work).

subcontracted with another company to transport its newspapers from Valencia to the Long Beach area. Thus, the Employer's decision is not the kind of "partial closing" - or going out of part of a business - that was at issue in First National Maintenance.[9]

Applying the Dubuque test, the General Counsel can show that the Employer's subcontracting and closure of its Long Beach transportation department did not constitute a significant change in the nature or direction of its business. The Employer continues to produce the Press-Telegram, and to sell and distribute it to the Employer's traditional customer base.

The Employer has not asserted any of the Dubuque defenses, but has asserted only that the closure of the department was a "partial closure" similar to that found in First National Maintenance to constitute a non-mandatory subject of bargaining. We have rejected that argument. Furthermore, by the Employer's own admission in declining to consider the Union's proposal because of wage cost concerns, the decision was based at least in part on labor costs.[10] Thus, the Employer cannot establish the first Dubuque affirmative defense, and has not asserted nor submitted evidence that would establish the second affirmative defense. Accordingly, the decision to subcontract the work of the transportation department and lay off the employees was a mandatory subject of bargaining.[11]

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[9] See Bob's Big Boy Restaurants, 264 NLRB 1369 (1982).

[10] The Employer reiterated that admission in its position statement to the Region, wherein the Employer explained that it rejected the Union's proposal as "too expensive" since it could lease trucks and drivers in Valencia for less than having the unit employees perform the work.

[11] Because the layoff decision was inextricably intertwined with the decision to subcontract all of the work these employees could perform, and was an inevitable consequence of that decision, we would not allege in the alternative that the Employer was required to bargain about the layoff as an "effect" of the subcontracting decision regardless of whether the subcontracting constituted a mandatory subject

The Employer did not bargain in good faith over that decision. The Act contemplates pre-decisional bargaining, not bargaining after an employer has made and implemented a decision.[12] Here, the Employer made its decision before bargaining was initiated, telling the Union that a final decision had been made and notifying employees of their lay-off. Before the second bargaining session, the Employer had already entered into a subcontract with another company to perform the driving work. To the extent that the Employer was engaging in "bargaining" over the decision to lay off the employees, that post hoc bargaining was not good faith bargaining under the Act.

Moreover, even assuming the Employer bargained in good faith, the parties clearly were not at impasse at the time the Employer suspended negotiations and unilaterally implemented its decision. The Union had made a request for information that was highly relevant to the issues in bargaining and necessary to the Union in formulating proposals for alternatives to the Employer's proposed subcontracting of the transportation work and closure of the Long Beach department. The Employer had not provided that information. Under those circumstances, the parties could not have been at a legitimate impasse, and the Employer unlawfully implemented unilateral changes.[13]

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of bargaining. Compare Litton Financial Printing, supra. Rather, the decision to subcontract the work, dissolve the transportation department, and lay off the employees must be viewed as a single decision which was a mandatory subject of bargaining under the Board's analysis in Dubuque.

[12] See Allied Products, 218 NLRB 1246 (1975), enfd. in rel. part 548 F.2d 644 (6th Cir. 1977) (employer's presentation of fait accompli at the outset of negotiations necessarily obstructed meaningful bargaining).

[13] See Dependable Maintenance Co., 274 NLRB 216 (1985).

Accordingly, the Region should issue a Section 8(a)(5) and (1) complaint, absent settlement.

B.J.K.